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Leah Johannesson

J.D. Candidate, May 2015, Loyola Law School

Recommended Citation

Leah Johannesson, *Caution! Hot Ballot: Examining First Amendment Rights In Chamness V. Bowen*, 47 Loy. L.A. L. Rev. 967 (2014).
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CAUTION! HOT BALLOT: EXAMINING FIRST AMENDMENT RIGHTS IN *CHAMNESS v. BOWEN*

*Leah Johannesson**

I. INTRODUCTION

Michael Chamness was a long-shot candidate.¹ He ran in California's 36th congressional district election on May 17, 2011, and appeared on the primary election ballot as having "No Party Preference."² Although his voter registration form stated his membership in the Coffee Party,³ California's election law foreclosed him from stating that preference on the ballot.⁴ Indeed, "the ballot . . . is the last thing the voter sees before he makes his choice," and party preference designations provide an important voting cue.⁵ Before the election, Chamness filed suit, alleging that the law, Senate Bill 6 (SB 6), violated his First Amendment rights by forcing him to indicate that he had no party preference.⁶

* J.D. Candidate, May 2015, Loyola Law School, Los Angeles; B.A. Political Science, California Polytechnic State University, San Luis Obispo. Thank you to Professor Jessica A. Levinson for teaching me how to think about campaign-finance law, for her guidance and support through law school, and for her feedback on this Comment. And thank you to the editors and staffers of Volume 47 and 48 of the *Loyola of Los Angeles Law Review* for their work on this issue.

1. In his candidate statement, Chamness implored voters, "So I ask for your vote, but realize it's a long shot." Michael Chamness, *Chamness for Congress Message*, SMART VOTER (March 2011), http://www.smartvoter.org/2011/05/17/ca/la/vote/chamness_m/paper1.html.

2. *Chamness v. Bowen*, 722 F.3d 1110, 1114 (9th Cir. 2013).

3. Chamness, *supra* note 1. The Coffee Party USA describes itself as "a grassroots, non-partisan movement that aims to restore the principles and spirit of democracy in America." *Who We Are*, THE COFFEE PARTY USA, <http://www.coffeepartyusa.com/about> (last visited Oct. 25, 2013). The Coffee Party operates independently of political parties and does not endorse candidates. *Id.*

4. See CAL. ELEC. CODE § 13105(a) (West 2011) (amended 2012).

5. *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J., concurring); see *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) (explaining that "party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior").

6. *Chamness*, 722 F.3d at 1114, 1116; see also Complaint for Injunctive and Declaratory Relief at 2, 13–15, *Chamness v. Bowen*, No. CV 11-01479 ODW (FFMx) (C.D. Cal. Aug. 23,

When the case reached the Ninth Circuit, the court rejected Chamness's First Amendment claim and upheld the law requiring him to choose the ballot label "No Party Preference" or a blank space, ruling that the law was reasonably related to achieving the state's interest in regulating elections.⁷ The court explained that strict-scrutiny review, which requires the state to show that the law is narrowly tailored to serve a compelling government interest, did not apply.⁸ Indeed, as the Ninth Circuit has noted, voting regulations generally do not receive strict-scrutiny review.⁹

However, this Comment argues that the Ninth Circuit should have applied strict scrutiny to Chamness's claim. Part II of this Comment discusses the factual and procedural background of the case, and Part III sets forth the court's reasoning. Part IV will briefly discuss United States Supreme Court jurisprudence in ballot-access cases. Next, Part V argues that (1) the law at issue, SB 6, severely burdened candidates and voters' First Amendment rights; and (2) the state's interests, relied on in the opinion, are likely not sufficiently compelling to justify this burden. Part V also highlights possible challenges to SB 6. Lastly, Part VI concludes that applying strict scrutiny offers warranted constitutional protection for candidates and voters.

II. STATEMENT OF THE CASE

The California Legislature enacted SB 6 to implement Proposition 14, which created the open primary, top-two electoral system in California.¹⁰ When Chamness ran for office, SB 6 limited primary election candidates to three options for party preference designations: candidates could (1) designate their political party preference; (2) state "No Party Preference"; or (3) opt to leave the party preference space blank.¹¹ California Secretary of State Debra Bowen interpreted "political party" to mean a *qualified* political

2011) (alleging that "minor-party candidates are forced to falsely state on the ballot that they have 'No Party Preference'" in violation of the United States Constitution).

7. *Chamness*, 722 F.3d at 1116.

8. *Id.* at 1116–19.

9. *Id.* at 1116 (citing *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

10. *Id.* at 1113; *Top Two Candidates Open Primary Act and Voter-Nominated Offices*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/elections/statewide-elections/2012-primary/new-open-primary-info.pdf> (last visited Oct. 25, 2013). Proposition 14 has been codified as article II, sections 5 and 6, of the California Constitution. .

11. CAL. ELEC. CODE § 13105(a) (West 2011) (amended 2012).

party.¹² Thus, candidates may only designate a preference for qualified political parties, such as the Democratic or Republican Parties.¹³ Conversely, at the time of the contested election, candidates who preferred a non-qualified political party could only state “No Party Preference” or leave the party preference space blank.¹⁴

Michael Chamness ran for office in California’s 36th congressional district on May 17, 2011.¹⁵ He sought to designate himself as an Independent by using the label “Independent” in the party preference space.¹⁶ Instead, he appeared on the ballot with “No Party Preference” next to his name because he did not designate a preference for a qualified political party.¹⁷

On February 17, 2011, Chamness brought suit against Secretary Bowen and Los Angeles County Registrar-Recorder/County Clerk Dean C. Logan, challenging the constitutionality of SB 6.¹⁸ Chamness alleged that the law violated his free-speech rights because it forced him to falsely state that he had no party preference.¹⁹ In fact, he had a party preference: the Coffee Party.²⁰

Arguably, he could have opted to leave the party preference space blank, and he would not have been forced to state anything. However, on appeal, he maintained that the blank space option did not present a constitutionally permissible alternative because candidates who prefer a qualified party can designate their party preference, while Chamness, a candidate who identified with a minor

12. *Chamness*, 722 F.3d at 1113. For a political party to become a qualified political party, the party must meet conditions set forth in California Elections Code section 5100.

13. ELEC. § 13105(a). For a list of additional qualified political parties, see *Qualified Political Parties for the June 3, 2014, Primary Election*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/elections/political-parties/qualified-political-party.htm> (last visited Oct. 25, 2013). When Chamness ran for office, California had six qualified political parties. *Chamness*, 722 F.3d at 1113.

14. *Chamness*, 722 F.3d at 1113.

15. Plaintiff’s Opening Brief at 11, *Chamness*, 722 F.3d 1110 (No. 11-56449).

16. *Chamness*, 722 F.3d at 1114 n.2.

17. *Id.* at 1114. “[H]e appeared on the ballot as:

MICHAEL CHAMNESS

No Party Preference

Non-profit Organization Consultant”

Id.; see also ELEC. § 13105(a) (“If the candidate designates no [qualified] political party, the phrase ‘No Party Preference’ shall be printed instead of the party preference identification.”).

18. *Chamness*, 722 F.3d at 1114; Complaint for Injunctive and Declaratory Relief, *supra* note 6, at 1, 13.

19. Complaint for Injunctive and Declaratory Relief, *supra* note 6, at 2, 13–15.

20. See *Chamness*, *supra* note 1.

party, could not.²¹

On August 23, 2011, the district court granted summary judgment in favor of the defendants.²² Chamness appealed, arguing in part that the law denied him an accurate ballot label and thereby severely burdened his First Amendment rights.²³ On appeal, the Ninth Circuit rejected these arguments and affirmed the district court's ruling.²⁴

III. REASONING OF THE COURT

The Ninth Circuit held that Chamness “failed to establish that SB 6 severely burdened his rights.”²⁵ According to the court, Chamness did not explain how the regulation hindered the specific message that he wished to convey, in part because he failed to demonstrate that “Independent” and “No Party Preference” conveyed different meanings.²⁶ Specifically, he did not establish that the “No Party Preference” label created “negative connotations even to well-informed voters.”²⁷ Furthermore, if Chamness thought the “No Party Preference” label harmed his candidacy, the court explained, he could have left the party preference space blank.²⁸ Additionally, the court held that the regulation was “viewpoint neutral as to the required term ‘No Party Preference,’” because the law banned the term “Independent” for all candidates.²⁹ For these reasons, the court concluded that the burden on speech was slight.³⁰

Because the burden was slight, the court did not apply strict scrutiny.³¹ Rather, the court examined whether the state's regulatory interests justified the slight speech burden that SB 6 imposed on candidates desiring the designation “Independent.”³² The court

21. Plaintiff's Opening Brief, *supra* note 15, at 38 n.152.

22. Chamness v. Bowen, No. CV 11-01479 ODW (FFMx), 2011 WL 3021492, at *1 (C.D. Cal. Aug. 23, 2011), *aff'd*, 722 F.3d 1110 (9th Cir. 2013). The court also granted summary judgment in favor of intervenor-defendants California Independent Voter Project, Abel Maldonado, and Californians to Defend the Open Primary. *Id.*

23. Chamness, 722 F.3d at 1116; Plaintiff's Opening Brief, *supra* note 15, at 26–30.

24. Chamness, 722 F.3d at 1122.

25. *Id.* at 1116.

26. *Id.* at 1117–18.

27. *Id.*

28. *Id.* at 1118.

29. *Id.*

30. *Id.*

31. *See id.*

32. *Id.*

explained that “[n]ondiscriminatory restrictions that impose a lesser burden on speech rights need only be reasonably related to achieving the state’s important regulatory interests.”³³ The court concluded that the state’s interests in preventing voter confusion and managing its ballots justified the slight burden on First Amendment rights.³⁴

Notably, the court treated Chamness as a “genuine [I]ndependent.”³⁵ As stated by Richard Winger, the editor and publisher of *Ballot Access News*, in Chamness’s Complaint, Chamness “wanted the label ‘[I]ndependent[,]’” but “[i]n later briefs he suggested that he really want[ed] the label ‘Coffee Party.’”³⁶ The court did not address whether he wanted a label for a non-qualified political party and instead expressed “no views as to the validity of California’s restriction against stating preferences for non-qualified parties.”³⁷

After the district court entered judgment, and before the Ninth Circuit heard the case, California removed the blank space option from section 13105(a) of the California Election Code.³⁸ Thus, candidates can no longer opt to leave the party preference space blank.³⁹ The court explained that Chamness did not argue “that the presence or absence of the blank space option” affected the law’s constitutionality and “expressed[ed] no view as to whether the removal of the blank space option compels speech by requiring candidates who prefer a non-qualified party to falsely state that they have no party preference.”⁴⁰ In other words, the Ninth Circuit did not address how removal of the blank space option may affect the law’s constitutionality, because, according to the court, Chamness only argued that the law unconstitutionally denied him the label “Independent.”⁴¹

33. *Id.* at 1116 (internal quotation marks omitted) (citing *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002)).

34. *Id.* at 1118–19.

35. Richard Winger, *Independent Candidate Loses in Ninth Circuit*, *BALLOT ACCESS NEWS*, Aug. 2013, at 2; *see also Chamness*, 722 F.3d at 1114 n.2 (“As in his complaint, Chamness argues on appeal only that he wished to designate himself ‘Independent’ on the primary election ballot, not that he must be allowed to identify himself as a member of the ‘Coffee Party.’”).

36. *Id.*

37. *Chamness*, 722 F.3d at 1118 n.5.

38. CAL. ELEC. CODE § 13105(a) (West 2012); *Chamness*, 722 F.3d at 1116 n.4.

39. CAL. ELEC. CODE § 13105(a) (West 2012); *Chamness*, 722 F.3d at 1116 n.4.

40. *Chamness*, 722 F.3d at 1116 n.4.

41. *Id.*

IV. THE CURRENT TEST

Whether a ballot access restriction imposes a severe burden or a reasonable, non-discriminatory burden dictates the level of scrutiny employed by the court.⁴² If the state law imposes a severe burden on the right to vote and associate, the court will apply strict scrutiny.⁴³ Under this standard, the court must determine whether the ballot access restriction is narrowly tailored to achieve a compelling governmental interest.⁴⁴ For example, in *Williams v. Rhodes*,⁴⁵ the Supreme Court held that election laws that kept minor political parties off of the ballot imposed severe burdens on the right to vote and the right to associate.⁴⁶ Applying strict scrutiny, the Court concluded that the state failed to demonstrate any “compelling interest” that would justify those burdens.⁴⁷ *Williams* has been described as the Supreme Court’s high-water mark for protecting ballot access by minor parties.⁴⁸

Conversely, regulations that impose a lesser burden on First Amendment rights trigger a lower level of scrutiny.⁴⁹ For example, in *Anderson v. Celebrezze*,⁵⁰ the Supreme Court held that a statute requiring an independent candidate for President to adhere to an early filing deadline unconstitutionally burdened voting and associational rights of the independent candidate’s supporters.⁵¹ *Anderson* instructs:

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to

42. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

43. *See id.*; *Chamness*, 722 F.3d at 1117.

44. *Chamness*, 722 F.3d at 1116.

45. 393 U.S. 23 (1968).

46. *Id.* at 26, 30–31.

47. *Id.* at 31; Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 186 (1991) (discussing how *Williams* applied a “rigorous strict scrutiny standard”).

48. Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties*, 44 LOY. L.A. L. REV. 463, 479 (2011); *see also* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections*, 85 B.U. L. REV. 1277, 1288 (2005) (“The Court’s first major foray into the field of ballot-access was also the high-water mark of protection afforded third-party challengers.”).

49. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

50. 460 U.S. 780 (1983).

51. *Id.* at 805–06.

vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.⁵²

This balancing test has been likened to intermediate scrutiny.⁵³ Notably, the Supreme Court in *Anderson* protected ballot access for Independent candidates.⁵⁴ However, subsequent cases employing this lower level of scrutiny have upheld ballot restrictions as reasonably related to a state's regulatory interests.⁵⁵

V. ANALYSIS

The *Chamness* court should have applied strict scrutiny to Chamness's claim. Contrary to the court's finding, SB 6 heavily burdened Chamness's rights and the rights of voters to associate for the advancement of political beliefs, which triggers strict scrutiny. Additionally, the court overestimated the importance of the government interests relied on in the opinion, which likely do not justify the heavy burden on First Amendment rights. Had the court applied strict scrutiny and expressed a view on California's disparate treatment of candidates who prefer non-qualified political parties, the constitutionality of SB 6 would likely have been a closer question.

52. *Id.* at 789.

53. Levinson, *supra* note 48, at 493.

54. *Anderson*, 460 U.S. at 805–06.

55. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997) (“[T]he burdens Minnesota’s fusion ban imposes on the New Party’s associational rights are justified by ‘correspondingly weighty’ valid state interests in ballot integrity and political stability.”); *see also* *Burdick v. Takushi*, 504 U.S. 428, 434, 440 (1992) (“[L]egitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii’s voters.”).

*A. SB 6 Imposes a Severe Burden on
Candidates' and Voters' Rights to Associate
for the Advancement of Political Beliefs*

First, SB 6 impinges on candidates' associational rights because it treats candidates with political preferences "outside the existing political parties" differently from candidates with qualified party preferences.⁵⁶ In *Anderson*, the Supreme Court held: "[A] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."⁵⁷ But in *Chamness*, the court found that SB 6 treated all candidates equally: it allowed all candidates to put their name on the primary ballot, and it prohibited all candidates from using the label "Independent."⁵⁸ However, SB 6 allows only a certain group of candidates, those that prefer qualified parties, to appear on the primary ballot with an affirmative party preference label.⁵⁹ This results in a recognition advantage for those who prefer qualified parties.⁶⁰ Accordingly, the burden falls unequally on candidates who prefer non-qualified parties, necessitating heightened review.⁶¹

Second, and more importantly,⁶² SB 6 infringes on voters' rights to associate and effectively vote. When viewing the primary election ballot, non-qualified party voters cannot determine which candidates identify with their specific interests, whereas qualified party voters can.⁶³ In *Anderson v. Martin*,⁶⁴ the Supreme Court recognized the importance of ballot labels attached to a candidate's name, as the state places a label on a candidate "at the most crucial stage in the electoral process—the instant before the vote is cast."⁶⁵ Ballot labels help voters associate with their candidates of choice and cast

56. See *Anderson*, 460 U.S. at 793–94 (citing *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion)).

57. *Id.* at 793–94.

58. *Chamness v. Bowen*, 722 F.3d 1110, 1118 (9th Cir. 2013).

59. CAL. ELEC. CODE § 13105(a) (West 2011) (amended 2012).

60. See *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992); Levinson, *supra* note 48, at 509.

61. See *Anderson*, 460 U.S. at 793.

62. *E.g., id.* at 794 (emphasizing the "particular importance" of a law's effect on voters' associational rights).

63. See *Bachrach v. Sec'y of the Commonwealth*, 415 N.E.2d 832, 836 (Mass. 1981).

64. 375 U.S. 399 (1964).

65. *Id.* at 402 (holding that the designation of a candidate's race on the ballot violated the Fourteenth Amendment).

meaningful votes that reflect their ideology or affiliation.⁶⁶ In *Williams*, the Supreme Court held that the right to associate and the right to effectively vote rank “among our most precious freedoms”;⁶⁷ and thus, here, the court should apply strict scrutiny.

Conversely, the Ninth Circuit declined to assume harm to voters’ rights “in the absence of evidence.”⁶⁸ As the court explained, Chamness did not provide empirical evidence to establish a difference between “Independent” and “No Party Preference.”⁶⁹ Furthermore, he did not establish that voters would vote differently based on the labels.⁷⁰ Because the court lacked evidence, it assumed that “the ballot was presented to a well-informed electorate” who understood California’s ballot labels.⁷¹ The court indicated that it required evidence proving a “distinction in likely impact between ‘Independent’ on the one hand, and ‘No Party Preference,’ when pitted against other ‘preference’ designations for California’s six qualified parties.”⁷² Thus, the court’s opinion may have been different if it had had such evidence.

Additionally, the *Chamness* court held that its decision did not conflict with the Sixth Circuit case, *Rosen v. Brown*.⁷³ In *Rosen*, the Sixth Circuit invalidated a law that prohibited a non-party candidate from having the ballot designation “Independent” or “Independent candidate” by his name on a general election ballot, but provided labels for Democratic and Republican candidates.⁷⁴ There, non-party candidates secured a position on the ballot through an independent candidate’s nominating petition.⁷⁵ The *Rosen* court, citing expert testimony, found that “[w]ithout a designation next to an Independent’s name on the ballot, the voter has no clue as to what the candidate stands for.”⁷⁶

66. *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) (“Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting.”).

67. *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).

68. *Chamness v. Bowen*, 722 F.3d 1110, 1117–18 (9th Cir. 2013).

69. *Id.*

70. *Id.*

71. *Id.* at 1118 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454–55 (2008)).

72. *See id.* at 1120.

73. *Id.*; *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992).

74. *Rosen*, 970 F.2d at 177–78.

75. OHIO REV. CODE ANN. § 3513.257 (West 2013); *Rosen*, 970 F.2d at 171.

76. *Rosen*, 970 F.2d at 172.

The Ninth Circuit held that Chamness could not rely on *Rosen*.⁷⁷ Unlike the plaintiff in *Rosen*, Chamness did not present evidence to establish a difference between the meaning of “Independent” and “No Party Preference.”⁷⁸ Also, the specific party labels disputed in *Rosen* (“Independent” and no designation versus “Democrat,” or “Republican”) differed from the party labels disputed in *Chamness* (“Independent” and “No Party Preference” versus qualified party preference designations).⁷⁹

Admittedly, in contrast to the Independent candidates in *Rosen*, Chamness could use a label: “No Party Preference.” However, the “No Party Preference” label inaccurately captured Chamness’s party preference and therefore did not provide a meaningful voting cue to voters.⁸⁰ Furthermore, the studies and expert testimony in *Rosen* discussed the general importance of ballot labels, including the “Independent” label.⁸¹

Moreover, the court should not require proof to find that designations influence the way voters cast their votes. In *Washington State Grange v. Washington State Republican Party*,⁸² where the Supreme Court rejected a political party’s challenge to the state’s open-primary, top-two electoral system,⁸³ Chief Justice Roberts explained in his concurring opinion that he would not require political parties to establish voter perception through studies.⁸⁴ In his dissenting opinion, Justice Scalia argued, “It does not take a study to establish that when statements of party connection are the sole

77. *Chamness*, 722 F.3d at 1120.

78. *Id.*

79. *Id.* Lastly, unlike the legislators in *Rosen* who enacted the law to preserve political dominance of the Democratic and Republican Parties, the *Chamness* court held, “There does not appear to be any legitimate argument that the law in this case seeks to insulate any political party or parties from competition.” *Id.*

80. *See Rosen*, 970 F.2d at 172; *Chamness*, *supra* note 1.

81. *Rosen*, 970 F.2d at 172–73. However, the *Rosen* court stressed its reliance on evidence in the form of expert testimony. The *Rosen* court distinguished the Fifth Circuit case *Dart v. Brown*, which upheld a law that prevented minor-party candidates from stating their party affiliation on the ballot. 717 F.2d 1491 (5th Cir. 1983). The *Rosen* court explained that the Fifth Circuit in *Dart* recognized that a candidate’s lack of party affiliation on the ballot could impair voters’ rights, but did not have evidence demonstrating such impairment. *Rosen*, 970 F.2d at 176. The *Rosen* court further explained that, unlike the *Dart* court, it had such evidence. *Id.*

82. 552 U.S. 442 (2008).

83. *Id.* at 458–59.

84. *Id.* at 461–62 (Roberts, C.J., concurring) (“Nothing in my analysis requires the parties to produce studies regarding voter perceptions on [how voters interpret candidates’ designations], but I would wait to see what the ballot says before deciding whether it is unconstitutional.”).

information listed next to candidate names on the ballot, those statements will affect voters' perceptions of what the candidates stand for, what the party stands for, and whom they should elect."⁸⁵

The Massachusetts Supreme Court case *Bachrach v. Secretary of Commonwealth*⁸⁶ is also instructive. In *Bachrach*, the Massachusetts Supreme Court applied strict scrutiny and held that a law prohibiting the ballot label "Independent" and instead requiring candidates to state "Unenrolled" violated constitutional rights.⁸⁷ Without citing empirical evidence, the court declared, "Unenrolled is hardly a rallying cry" and indicated that the label "would have a negative connotation for voters."⁸⁸ Like "Unenrolled" in *Bachrach*, "No Party Preference" in *Chamness* could create a similar, negative connotation for voters.⁸⁹

B. The State's Interests Likely Do Not Justify SB 6

The Ninth Circuit held that SB 6 "is sufficiently supported by the state's important regulatory interests" in preventing voter confusion and managing its ballots.⁹⁰ But when applying strict scrutiny, the court must determine whether the law furthers a compelling state interest.⁹¹ Indeed, government interests rarely survive strict-scrutiny review.⁹²

First, the state's interest in preventing voter confusion is weak at best. The court explained that voters might confuse "Independent" and the qualified "American Independent Party," even though the court assumed a well-informed electorate earlier in its opinion.⁹³ "No Party Preference" possibly misleads voters, because the label

85. *Id.* at 469 (Scalia, J., dissenting).

86. 415 N.E.2d 832 (Mass. 1981).

87. *Id.* at 836–37.

88. *Id.* at 836.

89. See Oral Argument at 09:09–10:15, *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013) (No. 11-56303), available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010402.

90. *Chamness*, 722 F.3d at 1118–19. The court did not rely on the government's asserted "'interest in maintaining the distinction between qualified political parties and nonqualified political bodies' as justifying the 'No Party Preference' language." *Id.* at 1118 n.5.

91. *Id.* at 1116.

92. "Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (citing Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

93. *Chamness*, 722 F.3d at 1118.

actually means no *qualified* party preference.⁹⁴ Additionally, the law denies voters information about candidates, because candidates who prefer non-qualified parties cannot designate their actual party preference on the ballot. Indeed, “[a] State’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.”⁹⁵ A ballot label that designates the candidate’s actual party preference would lead to more information—rather than create confusion—by providing voters with an important voting cue about candidates.⁹⁶

Granted, Chamness’s own example presents a case of possible voter confusion. He ran for office affiliated with the Coffee Party,⁹⁷ but sought the label “Independent” on the ballot.⁹⁸ This could confuse voters: is he an independent candidate or does he prefer the Coffee Party? But the potential for voter confusion seems greater in a system that denies information, instead of in a system that allows voters to judge for themselves the candidate’s designation.⁹⁹ Again, the state’s claim regarding voter confusion should be viewed with skepticism.¹⁰⁰

Second, the state’s interest in managing its ballots is slightly more compelling, but likely not sufficient to survive strict scrutiny.¹⁰¹ As the *Chamness* court warned, questionable self-designations would require the state to make “case-by-case governmental decisions regarding the acceptability of various self-designations.”¹⁰² Perhaps the state tried to minimize this type of decision making by specifying a mechanical scheme for designations.¹⁰³

On the other hand, the state could manage its ballots while

94. See Oral Argument, *supra* note 89, at 31:00.

95. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (internal quotation marks omitted) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986)).

96. Levinson, *supra* note 48, at 504, 509.

97. Chamness, *supra* note 1.

98. Chamness, 722 F.3d at 1114.

99. Levinson, *supra* note 48, at 504.

100. See *supra* note 95 and accompanying text.

101. See Chamness, 722 F.3d at 1118.

102. *Id.* at 1119.

103. See Oral Argument, *supra* note 89, at 16:30. However, Washington state makes those decisions, as it allows candidates up to sixteen characters to designate their political party preference, and provides for when the filing officer may intervene to edit, reject, or replace a candidate’s self-designation. WASH. ADMIN. CODE § 434-215-120 (2008).

offering more than a small number of prescribed labels. The state could avoid “questionable self-designation”¹⁰⁴ with a less burdensome regulation by allowing candidates to designate themselves as preferring a non-qualified political party. For example, in *Rubin v. City of Santa Monica*,¹⁰⁵ the Ninth Circuit upheld a California regulation that allowed candidates to designate their occupations while prohibiting non-occupational, status designations.¹⁰⁶ Here, even if a new California regulation offered more than a small number of prescribed labels, candidates would still face restrictions like those seen in *Rubin*. The restrictions, in turn, could limit candidates’ choice of designation and preclude candidates from using the designation they feel best promotes their candidacy.¹⁰⁷ A less burdensome regulation could even exclude Chamness from stating the term “Independent” because that label does not indicate preference for a non-qualified party.¹⁰⁸

Overall, the state’s interests relied on in *Chamness* likely do not survive strict-scrutiny review.

C. This Case Provides Significant Guidance to Future Challengers

After the election at issue in *Chamness*, the state eliminated the blank space option.¹⁰⁹ In *Chamness*, the Ninth Circuit relied on the blank space option to conclude that the burden on Chamness’s speech was slight.¹¹⁰ Specifically, the court maintained that if Chamness disagreed with the message that “No Party Preference” conveyed, he could have opted for the blank space option.¹¹¹ Now, this is no longer the case, as candidates who prefer a non-qualified political party must state “Party Preference: None,”¹¹² even if they disagree with the message. Thus, future challengers may have a stronger claim that the law impermissibly compels speech and

104. *Chamness*, 722 F.3d at 1119.

105. 308 F.3d 1008 (9th Cir. 2002).

106. *Id.* at 1015 (holding that ballot regulation prohibiting “status” designations did not violate candidate’s free speech rights).

107. See Oral Argument, *supra* note 89, at 14:35.

108. See *Chamness*, 722 F.3d at 1118 n.5 (explaining that Chamness did “not contend that ‘Independent’ is a political party”).

109. CAL. ELEC. CODE § 13105 (West 2012).

110. *Chamness*, 722 F.3d at 1118, 1119.

111. *Id.* at 1118.

112. ELEC. § 13105.

therefore severely burdens their First Amendment rights.¹¹³

Chamness demonstrates the Ninth Circuit's current requirement that the challenger must introduce empirical evidence for the court to find a severe burden on First Amendment rights. Specifically, the Ninth Circuit seems to require evidence demonstrating the difference between the desired label "I prefer the [non-qualified] party" and the current label "Party Preference: None," when presented against preference designations for qualified parties.¹¹⁴

VI. CONCLUSION

Like *Chamness's* candidacy, this was a long-shot case. Though relying on precedent, which rarely subjects voting regulations to strict scrutiny,¹¹⁵ the Ninth Circuit underestimated the rights at stake and overestimated the government's interests.¹¹⁶ The rights at stake are critical to democracy: the right to associate for the advancement of political beliefs and the right to meaningfully vote.¹¹⁷ Thus, the court should apply strict scrutiny to protect these critical rights.

113. *See Chamness*, 722 F.3d at 1116 n.4.

114. *See id.* at 1120.

115. *Id.* at 1116 (citing *Dudum v. Armtz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

116. *See supra* Parts III, V.A–B.

117. *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).